No. 11885.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Tug Rocona, her engines, tackles, apparel and furniture, Johnson Western Company, a corporation, and Case Connolly Company, a corporation,

Appellants,

vs.

Guy F. Atkinson Company, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

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I.

STATEMENT OF PLEADINGS AND FACTS.

Appellants, the Tug Rocona, etc., Johnson Western Company, a corporation (respondents below), and Case Connolly Company, a corporation (claimant below), are appealing from the Interlocutory Decree and Order of Reference of the United States District Court, Southern District of California, Central Division, entered in that Court on February 10, 1948. The case is one in Admiralty and was tried before the Honorable Campbell E. Beaumont, Judge Presiding. The statement of statutory provisions, pleadings and facts under Rule 20 of the above entitled Court follows:

A.

Statutory Provisions Believed to Sustain the Jurisdictions.

The cause was initiated, tried and handled throughout under the basic jurisdiction of the United States District Court, provided by 28 U. S. C. A., Section 41(3) (Judicial Code, Section 24). The libel filed is both *in rem* and *in personam*. The libel itself states specific facts, and such were proven at the trial, to the effect that the subject matter of the cause and the occurrences relied upon by the libelant below, took place upon the navigable waters of Long Beach Harbor, California. It is clear, therefore, that the District Court had jurisdiction.

This Court has jurisdiction upon appeal to review the Interlocutory Decree and Order of Reference in question under the General Statute, 28 U. S. C. A., Section 227, as amended (Judicial Code, Section 129).

B.

Pleadings Necessary to Show the Existence of the Jurisdictions.

Libel both *in rem* and *in personam* was filed in United States District Court in accordance with the statutory provisions referred to above. The libel appears at pages 4-9 of the record. In brief, the libel alleged a cause of negligent towage of and damage to a certain unpowered barge (referred to as Barge #4414), owned by the appellee. The libel alleged that Barge #4414, loaded with rock, was delivered to the Tug Rocona at Catalina Island, California, to be towed to Long Beach Harbor, and there moored to a float. The first cause of action alleges such arrangement as a contract of towage for a consideration. Such first cause of action goes on to allege that the barge

was loaded with 879 tons of rock, was towed by the Tug Rocona on April 1, 1945, and redelivered to the libelant at a mooring float in Long Beach Harbor in a sinking and unseaworthy condition, with a large hole punched in her bottom, approximately 20 feet aft of the bow rake and about five feet from the starboard side. It is further stated in the first cause of action that, to prevent the barge from sinking with its load of rock, the libelant towed the barge about the Harbor in order to discharge the load overboard. Claim is made for the cost of repairs, the value of lost cargo and detention damages, together with certain other incidental items of damages.

The second cause of action sounds in tort and, in brief, alleges that the Rocona and the agents and servants of her owners, towed and moored the barge in an improper, careless and imprudent manner in that she was, upon being moored, allowed to override and run above the mooring float when the mooring pendant of the float was affixed to the mooring bit of the barge. It is thereafter stated in the second cause of action that the forward motion of the barge caused the mooring line and the anchor chain of the float to become taut, the mooring float overturning below the barge. Thereafter, in the second cause of action, follow five detailed specifications of negligent action on the part of the appellants relied upon by appellee as the direct and proximate cause of the damages to the barge.

The Pretrial Stipulation [pp. 16-20 of the Record], states the facts which were agreed upon between the parties prior to trial, and which, together with the record of testimony taken from witnesses, constitutes all of the facts before the trial court.

Appellants answered the libel admitting certain allegations and denying the substantial allegations of negligence and improper towing and mooring. The answer [pp. 10-16 of the Record] also clarifies the ownership of the Tug Rocona at the material times. It is therein stated that the Tug Rocona on April 1, 1945, was owned by Case Connolly Company, a corporation, the claimant below and one of the appellants in this Court, and that the vessel was operated by Case Construction Company, a copartnership. It appears elsewhere in the action, and was not disputed, that Johnson Western Company, a corporation, one of the appellants herein, is the successor in ownership to all of the assets and assumed all liabilities of Case Construction Company, the previous copartnership.

The answer denies the truth and accuracy of the specific facts alleged by the libelant and in contradistinction thereto alleges the true facts and circumstances in paragraph V of the answer [pp. 12-13], to-wit: That the barge was loaded by the libelant in an improper and unsafe manner and when delivered to the Tug Rocona she was not in a safe, sound or seaworthy condition in that she was heavy by the stern with approximately two to three feet of freeboard at the bow and six to eight inches of freeboard at the stern. It is further alleged in the answer that the voyage between Catalina Island and Los Angeles Harbor was completed without untoward event and that at about the hour of twelve midnight on the night of March 31-April 1, 1945, the Rocona moored the barge in a safe, proper and seamanlike manner to a certain mooring block or float provided by and the property of the libelant. The answer goes on to allege that having completed her towing and mooring engagement safely and properly, the tug departed and that at some unknown time thereafter damage occurred to the bottom

of the barge. On information and belief the appellants allege that the damage to the bottom of Barge #4414 was caused by the ebb and flow, rise and fall of the sea, lifting or impelling the barge up, over and upon the U-bolt affixed to the mooring block. Also, it is alleged in the answer that the chain from the anchor of the mooring float was too short, and that by reason of such condition the floating portion of the mooring facility was submerged or partially submerged, thus making it inevitable that a heavily laden craft moored thereto would, during high tide or medium tide, be hoisted or impelled upon and over the top of the mooring float. In answering the appellee's second cause of action the general denials are repeated, and it is further alleged that the tug, her agents, employees and servants, master and crew, used proper care, caution and seamanship both in the towing and in the mooring of Barge #4414.

The first stated separate defense is in the form of a general demurrer to paragraphs I to VII of the first cause of action, but not having relied upon such ground for dismissal of that cause of action below, appellants do not argue it in this Court.

As a second and separate defense the appellants alleged contributory negligence in respect to the furnishing of a mooring facility which was allegedly improper and unsafe.

Findings of Fact and Conclusions of Law are found on pages 21-26, and the Interlocutory Decree at pages 27-28.

Order allowing Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was entered by the District Court within the three months time permitted under the statute. The Order Allowing Appeal appears at page 30 and the Petition for Appeal at page 29. As-

signment of Errors was filed at the same time and appears at pages 31-34 of the record.

We believe that the jurisdiction of the District Court and of this Court on appeal is clearly evident from the recitation of the pleadings.

C.

Statement of Facts.

The facts in this matter are not complicated. However, neither the actual *cause* of the damage, nor the *time* of the damage to Barge #4414 appear from direct evidence at any place in the record. The libelant (appellee in this Court) relied wholly upon inferences and what it claimed to be the burden resting upon appellants to explain what happened and when, and to demonstrate that the tug, her master and crew performed their duties properly and in a seamanlike manner.

The barge was loaded at Catalina Island by and under the direction and control of the owner (appellee). Barge #4414, along with one other barge, was towed to Long Beach Harbor, where the appellee was constructing a mole. The barge in question was the forward barge of the two being towed in tandem by the ROCONA across the Catalina Channel. The barge was riding high at the bow and low at the stern. No untoward event occurred during the voyage. After entering through the breakwater at Long Beach Harbor, the other tow was turned over to another harbor tug and the ROCONA proceeded with the barge in question (which was then almost dead in the water), to the float owned, maintained and furnished by

the appellee, which mooring was situated about a quarter or a half of a mile from the point of casting off the other barge.

When approximately 100 or 150 feet away from the mooring, the Rocona shut off power to the extent that the barge was practically dead in the water as she slowly approached the floating mooring block. A hand was put aboard Barge #4414 for the purpose of accomplishing the actual mooring operation. With a pike pole, the hand finally and after considerable difficulty, succeeded in lifting the mooring pendant from the mooring block and putting it over the forward starboard mooring bit of the barge. The mooring pendant was abouty fifty feet long. At this time the undisputed evidence shows that Barge #4414 was virtually dead in the water and that the mooring float with which the hand (witness Tomasic) was having difficulty in respect to the mooring pendant, was on the forward starboard side of the barge. Also, at the same time, the Tug Rocona was hove to off the port side, awaiting the completion of the mooring operation. The evidence shows that the Tug Rocona was so situated and so maneuvered by her master that were it necessary, she could lend assistance in regard to controlling the operation of the tow—the line from the tow to the tug was still fast but no forward pull was being exerted upon the tow.

The witness Tomasic completed the mooring operation after spending a few minutes "fishing" up the pendant and then reboarded the Tug Rocona which circled the barge, playing her light upon her to see that all was secure.

Thereupon, she departed from the scene. Normal ebb and flow of tide and harbor surge of the sea was present at all times.

Appellee's Assistant Project Manager, though not physically present when this barge came in, was charged with the duty and possessed of the authority over bringing in and mooring his company's barges and they were subject to such control and direction on behalf of appellee. Appellee's said employee was responsible for the tow until she was made fast.

Soon after the mooring was completed, one of the appellee's employees in a speedboat made his inspection rounds of the mooring facilities to see that all matters were normal and to inspect conditions in general. He particularly observed the Barge #4414 at her mooring and saw nothing abnormal, and regarded her as safe and secure. Approximately an hour and a half later—though not settled by the evidence with certainty—Barge #4414 was found in a listing condition and taking water over the sides and in the process of dumping her rock cargo overboard. Thereafter, assistance was given to her in respect to towing her about the harbor to salvage part of the load and to prevent sinking of the barge.

The following day Barge #4414 was capsized and a hole in her bottom was discovered about 20 feet aft of the forward rake and approximately five feet inboard from the starboard side. Planks numbers 22 and 23 were stove in. The hole was approximately the size and general pattern of the U-bolt on the top of the mooring float.

Scraping marks on the hull leading to the point of damage were apparent in a diagonal course from the forward starboard corner of the barge. There were also indentations on the planks in the vicinity of the hole, which indicated pressure of the U-bolt from the underside, but which did not actually puncture the planks at the point of indentation.

The principal difficulty with the case was the absence of direct evidence as to *when* and *how* the damage occurred.

The master and both hands aboard the ROCONA testified at length, independently and in precise detail how all of the operations in connection with the towing and the mooring were performed. The appellee's witnesses were able only to speculate concerning *when* and *how* the damage occurred. The matter came to the knowledge of appellees only when the barge was discovered in a sinking condition at least an hour and a half after the actual mooring operation was completed and the tug had left. Prior to that time one of appellee's witnesses, in making his tour of inspection of the harbor and the mooring facilities had observed all in due order with Barge #4414 moored to the float, in proper trim, and it was only some time thereafter that the barge was discovered to be in trouble.

The District Court wrote no opinion in this case and signed Findings and Decree precisely as prepared and submitted by appellee—altering only the name of the designated Special Master.

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The District Court wrote no opinion in this case and signed Findings and Decree precisely as prepared and submitted by appellee—altering only the name of the designated Special Master.

II.

STATEMENT OF THE CASE.

Succinctly stated, the questions involved in this appeal are as follows:

(1) Is the appellee entitled to recover the damages alleged from the appellants on the basis of fault and negligence in connection with the mooring of the Barge #4414, and the consequent puncturing of the bottom of the barge? In other words, was the mooring of the barge negligently done?

(2) Must the appellants bear the burden of proof to show that the towing and the mooring of Barge #4414 was accomplished with due and proper care and seamanship, and in connection with such burden must appellants account for the time and precise cause of the damage to Barge #4414?

(3) Was the District Court justified in concluding from the record of trial that the damage to Barge #4414 could occur in no other possible way and from no other possible cause than fault and negligence on the part of the tug, her master and crew, at the time of mooring the barge?

The first question is raised because the only direct, reasonable and credible evidence of what occurred at the material times was not impeached and was offered solely by the appellants. The only evidence offered by the appellee was in the nature of negative opinion and speculative evidence conditioned and based upon assumed facts not proven and upon presupposed hypotheses.

The second question is raised because appellee contended throughout that the burden of explaining what happened and of demonstrating that they were free from fault, rested upon the appellants because the barge was not manned by any of the appellee's agents or servants and was (until the tug left her at the mooring block) wholly in the physical custody and under the mechanical control of the appellants. Appellee further contended that the relationship of bailor-bailee was present in this matter.

The third question is raised because the District Court reached its findings and based its Interlocutory Decree upon what must be conceded to be supposedly logical deduction and a process of exclusion and a finding that it was impossible otherwise to account for the damage to the barge than through the fault and negligence of the Rocona at or before the time she left the scene of the mooring, having secured Barge #4414 thereto.

III.

Assignment of Errors Relied Upon.

Appellant has assigned 27 errors (pp. 31-34) and relies upon them all. Nos. 8 and 24 are virtually identical, saving only that loss of cargo appears in No. 8 and only damage to the barge appears in No. 24. These latter two errors refer to the District Court holding the appellants responsible on the ground of negligence.

The assignments of errors fall broadly into three categories. Nos. 1-7 inclusive (p. 31); 10, 16, 19, 21, 23, 25 and 26 (pp. 32-34), are concerned with the first question involved, *i. e.,* the supposed fault and negligence on the part of the ROCONA, her master and crew in connection with the mooring.

Nos. 8, 9, 11, 12, 13, 20, 22 and 24 (pp. 32-33), have to do with the second question involved, namely, the burden of proof and the extent of responsibility claimed to rest upon the appellants.

Nos. 14, 15, 17, 18 and 27 (pp. 32-34), relate to the third question involved, namely, the faulty deductive process of decision employed by the District Court in reaching its decision.

IV.

ARGUMENT OF THE CASE.

A.

The Tug Rocona Towed and Moored Barge No. 4414 Properly, Without Fault or Negligence, and the Record Is Devoid of Any Evidence to Contradict the Direct, Reasonable, Credible and Unimpeached Evidence That Due Care Was Exercised in Fulfilling the Rocona's Duty as Tower.

Errors 1-7 inclusive (p. 31); and 10, 16, 19, 21, 23, 25 and 26 (pp. 32-34), are applicable here and are as follows:

1. The District Court erred in rendering a decree for libelant in any particular, or at all.

2. The District Court erred in holding that respondent, the tug ROCONA, was improperly and negligently navigated, maneuvered or operated, so as to cause Barge 4414 to override the mooring float.

3. The District Court erred in holding that respondent, Tug ROCONA, approached the float with Barge 4414 in tow at an excessive and negligent speed under the circumstances then and there prevailing.

4. The District Court erred in finding that respondent, Tug ROCONA, negligently failed to stop the forward motion of Barge 4414 upon reaching the mooring float.

5. The District Court erred in finding that the respondent, Tug ROCONA, negligently and carelessly moored Barge 4414, in that during said mooring said Barge was allowed to override said mooring float.

6. The District Court erred in finding that the respondent, Tug Rocona, failed to take reasonable steps to avoid causing Barge 4414 to override the said mooring float.

7. The District Court erred in finding that the damage to Barge 4414 was caused solely, proximately, or at all, by negligence of the Tug Rocona, her Master, agents, or employees.

10. The District Court erred in holding that Barge 4414 was not moored safely and properly by respondents.

16. The District Court erred in failing and refusing to accept the testimony of witnesses for respondents and claimant.

19. The District Court erred in holding that the momentum of Barge 4414 at time of mooring carried it slowly forward into and over the mooring float.

21. The District Court erred in finding that all the allegations of the Answer filed by respondents and claimant which are inconsistent with the findings of fact made and entered by the District Court, are untrue.

23. The District Court erred in holding that respondent, Tug Rocona, was negligent and in sole fault in the premises.

25. The District Court erred in holding that Guy F. Atkinson Company is entitled to recover from respondent, Tug Rocona, and respondent, Johnson Western Company, all losses and damages sustained by libelant in the premises, together with interests and costs.

26. The District Court erred in admitting the opinion evidence of libelant's witnesses as to the cause of the damage sustained by Barge #4414, which opinion evidence

was specifically objected to and admitted over the objection of respondents and claimant.

Before discussing points of law or the various subdivisions of argument, it is important first to envision the type of case which is before this Court and which came on before the District Court for trial. The appellants, by virtue of the facts, were of course the only ones in a position to know the precise manner of mooring and no one knew of their own knowledge when or how the damage occurred. The appellee, by the necessity of the case, was forced to rely if it could, upon presumptions, probabilities, inferences and speculation.

Hence, the nature of the evidence offered by the appellants should justly be subjected to more than ordinary scrutiny. Appellants are unreservedly willing to have the evidence of their witnesses thus scrutinized and carefully weighed. On the other hand, appellants justifiedly contend that such evidence should not be wholly eliminated and disregarded unless good cause and sufficient reason exist.

A reading of the testimony given by the master and the two hands and particularly careful observation of the cross-examination of those witnesses conducted on behalf of appellee will, we believe, demonstrate without question that their evidence was given honestly, accurately and reasonably. Further, it was not impeached or shaken in any particular and its consistency and its logic were not impaired either upon cross-examination or by the force of evidence offered by appellee's witnesses.

In short, the appellants come before this court maintaining that the correct, reasonable, credible and unimpeached evidence shows without any question whatever, that due care and seamanship was exercised in every

particular by the tug and those in charge of her during the towing of the barge and during the time of her mooring.

Appellants likewise maintain that in the field of inferences, probabilities and speculation, the result is every bit as consistent with a finding of due care and proper conduct as with a theory of fault and negligence. In those circumstances, neither hypothesis is established. *Gunning v. Cooley,* 281 U. S. 90, 94; 74 L. Ed. 720, 724 (n. 6).

Whatever happened after the mooring, assuming of course that it was properly done, would not be at the risk of the tug, her owner or those in charge of her.

(1) The Relationship of Tug and Tow Is Not One of Bailment Regardless of the Fact That Consideration Is Paid by the Tow. The Action Before This Court Is Ex Delicto and Not Ex Contractu and the Standard Is Due and Ordinary Care Under the Circumstances.

Notwithstanding the fact that the libel was filed in two counts, one on a contract of bailment and the other on a theory of tort based upon negligence, this action can be regarded, under the established and settled law, *only* as an action *ex delicto.* The law is ample and clear that regardless of the fact that consideration is paid to the tower, the contract of towage does not raise a bailment. Also, it is undisputed that the standard of care is due and ordinary care under the circumstances. The tower is required to use due and ordinary seamanship under the circumstances and his obligation is no greater from the standpoint of standard of care. Though attempts have been made in the past to look upon the tower as an insurer of the safety of the tow, that approach has been unequivocally rejected by the courts.

The case of *New York Trap Rock Corp. v. Christie Scow Corp.* (C. C. A. 2), 162 F. (2d) 624, 627, is sufficient authority for the rule that a contract of carriage does not place the tow in bail to the tug and such rule extends to an unmanned craft such as is before the court in this cause. Starting at the bottom of page 626 of 162 F. (2d), the Court said:

> "After some vacillation in the lower courts—as we showed in *The White City*—the Supreme Court definitely decided in *Stevens v. The White City,* that the doctrine that a contract of towage does not put the tow in bail to the tug, extends to cases where the tow in an unmanned scow or barge, and *a fortiori* where a bargee is on board."

For the point that this action is *ex delicto* and not *ex contractu,* and also that the tow is not in bail to the tug, we cite the case of *William Stevens v. The White City,* 285 U. S. 195, 201; 76 L. Ed. 699, 703, together with the numerous cases therein cited. That rule is indisputable on the basis of The White City case and we shall have occasion to discuss the case more fully at another appropriate point in this brief, because the whole opinion is of the utmost value in connection with the argument of this appeal. At page 703 of 76 L. Ed. Mr. Justice Butler said:

> "Petitioner's claim against respondent is not for breach of contract but one in tort. His allegations and proof in respect of the agreement between the parties were *made by way of inducement to his real grievance which was the damage to the Drifter* claimed to have been caused by negligence of respondent. It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu.*" (Citing many cases.) (Emphasis supplied.)

Were it needed, additional authority for the foregoing rule is found in the case of *Waldie v. Steers Sand & Gravel Corp.*, 151 F. (2d) 129, 131, where in citing THE WHITE CITY case, above, the court said:

> "But it must be remembered that she is not a bailee of the tow, and that the *tow must always establish her fault.*" (Emphasis supplied.)

(2) Discussion of Evidence of Due Care and Proper Seamanship re Mooring.

As previously mentioned, the only direct, reasonable and credible evidence of what occurred just prior to and at the mooring of Barge #4414 is found in the testimony of appellants' witnesses, Reeves, the master; Tomasic, the hand who did the mooring; and Gentle, the hand and winchman aboard the ROCONA. Brief reference will also be made to certain testimony given by one of appellee's witnesses, Jackson.

Shortly after the barge was made fast to the float appellee's employee, Jackson, made a tour of inspection of the mooring area "to look at all the barges and see how everything was laying" [p. 49]. He observed nothing unusual and he did pay *particular* attention to Barge #4414 then lying at the mooring float. His trip was for the purpose of seeing that all matters were secure [p. 62]. About an hour and a half later he observed that Barge #4414 was listing and efforts were then made to get the barge "inside to unload her" [p. 50].

It will be remembered that the load was an abnormal one—it was out of the ordinary—in that it was high at the bow and low at the stern. Such testimony was given by Captain Reeves, the master of the tug [p. 128]. It

is significant and important to keep in mind when studying the whole record of trial that:

(a) The trim of the barge as loaded by the appellee was abnormal, particularly in that she was high at the bow, and

(b) That at a time *following the mooring and after the departure of the libeled Tug* ROCONA, the barge was observed by one of appellee's employees and witnesses, *charged with the duty of determining such fact,* to be in no trouble, properly moored, and apparently riding safe and easy at the float.

The log of the ROCONA [p. 166] discloses that one hour and a quarter was consumed between the time of entering the harbor at the breakwater and the departure following the completion of the mooring operation. The tug entered the harbor through the east entrance to the breakwater. Thereafter she cast off to the charge of another tug, a second barge which had been towed across the Catalina Channel astern of the barge in suit. At the time of the transfer of the after barge to another tug, both Barge #4414 and the one to be cast off were practically at a standstill in the water. The line to the #4414 from the ROCONA was shortened and the tug proceeded with the single barge in the direction of the mooring float [p. 129].

When approximately a thousand feet away from the float, the ROCONA slowed and backed down to let the stern of the tug come easy to the barge. Thereupon, the hand, Tomasic, stepped aboard carrying a pike pole [p. 131]. Reeves, the master, picked out the float to be used with the ship's spotlight, and when distant about 100 to 150 feet from the mooring block, he shut off the tug's power and drifted [pp. 131-133, 141-142]. After shutting off

the power at about 100 feet from the mooring block, the stern of the tug (off to the port side of the barge) was "kicked down" so that the tug lay alongside the barge with no strain on the latter but still in a position to check the headway of the barge if she had headway. The barge was permitted to drift up to the mooring [p. 132].

From about 60 feet away [p. 145] Reeves, the master, observed Tomasic on the barge "fishing" for the mooring pendant attached to the float. He could see that Tomasic was having difficulty taking it aboard—"It took him quite a little while" [p. 145]. At that time there was no headway on Barge #4414, *i. e.,* "she was at a dead stop, other than the surge back and forth" [p. 134]. After Tomasic, aboard the barge, reported everything all right, the tug came alongside, threw off the tow wire, and Tomasic came aboard with his pike pole. Thereupon, Reeves played the ship's spotlight the length of the barge and departed from the scene. He observed nothing abnormal or unusual. After Tomasic put the mooring pendant over the bit on the barge, Captain Reeves did not thereafter tighten the line between the barge and the tug [pp. 133-134]. At the time, Captain Reeves could see that the top of the float was approximately level with the surface of the water and had green moss on it. To him that meant that she must have been waterlogged, a very old mooring, and that she must have been almost straight up and down on her anchor chain [pp. 135-136]. The greatest speed that was attained between the time of transferring the first barge to another tug and the time of mooring Barge #4414, was three-quarters to one knot per hour [pp. 139-140].

Tomasic, the hand who did the mooring while aboard Barge #4414, had had 12 years experience as a seaman

and at the time of the mooring had attended or assisted at moorings of barges of the type in quetsion for a period of seven or eight months [pp. 148, 165]. After the tow line was shortened when the tug was transferred, the line to Barge #4414 was about 35 or 40 feet long. It was about one-quarter or one-half mile from the place of delivering the other barge to the other tug, to the mooring [Point "T-1" to "T-2" on appellee's Exhibit No. 4, *i. e.*, harbor chart]. The mooring float ("T-2" on the chart) was about 1500 feet off the mole or landworks ("T-3") [pp. 152-155]. The weather was normal and the surge and ebb and flow of the tide and the harbor water were normal [p. 156]. The witness, Tomasic, saw the float when the light from the tug was played upon it a distance of about 750 feet. There were no other unoccupied or available floats for mooring purposes in the vicinity [p. 157]. At about 200 feet from the float, the captain stopped the tug engine and the boat "worked" ahead slowly [pp. 157, 172]. At the time of the mooring and after Tomasic had been placed aboard the barge, she was "dead in the water" [p. 163].

The barge (from the distance of 150 to 200 feet away from the mooring when the engine of the tug was cut off) drifted toward the mooring float on a course of approach so that if she had kept on, the float would have been on the barge's starboard side. The line to the tug was not taut at such time and the barge did not go by the mooring block or float [pp. 157-158, 162, 180].

It took Tomasic five or ten minutes to get the mooring pendant attached to the float out of the water so that it could be placed around the mooring bit on the forward, starboard corner of the barge. During the "fishing" operation the starboard corner of the barge was toward but

not touching the float. The witness did not go aboard the float to aid himself in "fishing up" the fouled pendant because it was too slippery from moss, which was of the long hairy type [pp. 158-160].

At the time of the struggle to get the pendant out of the water and fastened to the barge, the Tug Rocona was over on the port or left side, approximately parallel to the barge. Tomasic observed Captain Reeves in the pilot house looking through the window, which was open [pp. 161-162].

In lieu of summary of his testimony, we quote the following direct testimony of Tomasic, from page 162:

> "Q. Mr. Tomasic, as you recall that incident that night and what occurred, did or did not the Barge 4414 override that mooring float? A. Absolutely not.
>
> Q. How did you know that it didn't? A. Because if that barge would have overrun that mooring float I would never have got ahold of that cable unless we made another pass at it.
>
> Q. Did you feel any bump or any jar aboard the barge? A. No, sir.
>
> Q. Did you hear any thud or crash or cracking? A. Absolutely nothing, sir, outside of the normal noises that a barge always makes.
>
> Q. That is a slapping sort of thing, isn't it? A. That's right."

After Tomasic reboarded the Rocona the craft made a circle of the mooring barge, playing her spotlight upon the barge and the mooring float [pp. 181-182]. In answer to the court's question "Did you observe the barge *and the mooring* as you made the circle?" (emphasis supplied),

Tomasic answered "Yes, sir," and when asked "By what light did you observe it," the witness replied to the court:

> "Well, as we made our circle pretty close I was standing at that time on the after part of the deck, back by the tow winch, I could observe it through the side lights of the tug. Captain Reeves probably seen it in the searchlight" [p. 182].

Appellants' next witness, Gentle, was a towboat man, with about 90 days of service at the time of the occurrence in question, and was serving aboard the ROCONA as a deckhand and operated the winch. The ship's engineer was below decks at the engine control during all of the material times [pp. 188-189].

About a quarter to a third of a mile inside the breakwater the after tow was cast off and delivered to another harbor tug. The line to the Barge #4414 was shortened to about 60 feet between the two craft. (Tug ROCONA and Barge #4414.) They proceeded at a "slow bell" to the mooring. The speed under "slow bell" was one-half to three-quarters knots per hour [p. 195].

Gentle observed the float as the barge slowly approached with the starboard side of the barge toward the float, *i. e.,* as the ROCONA with her tow approached the float, she was running off towards the port side of the float [pp. 195, 202].

Being at the after winch, the witness saw the mooring approaching the starboard side of the barge and then observed the tug, having moved off to port, backing down to where "we were lying approximately alongside, just a little bit forward of the bow with the stern approximately 20 or 30 feet aft of the bow" [pp. 195-196]. There was no pulling on the line to the barge as the tug lay alongside during the mooring operation, *i. e.,* there was no "pull-

ing", only "maneuvering" to keep the barge in a direct line, and being off to the side of the barge the tug could swing her or just come up against the line so as to swing the barge. The witness pointed out that one could not hope to shut off power 150 or 200 feet away and have the barge run directly in a straight line "right to the float" [p. 196]. Mr. Gentle did not actually see Tomasic attempting to or in the act of mooring the barge to the float, because his view was obscured [p. 197].

Before the mooring was made, the witness saw the float and observed not more than three inches of her above water. Upon inspection of the float the witness saw long hairy type of moss thereon, although he saw very, very little on top of the float [pp. 198-199, 204].

It is significant that forty-eight hours later, Gentle observed that several pieces of 4 x 4 had been built in a bulkhead around the ring on the top of the appellee's float —apparently as a protection against damage being caused by the iron ring on the top of the float [pp. 197, 198-199].

The witness did not pay any attention to observing the completed mooring of Barge #4414 to the float, when, thereafter, the tug circled the barge—he just knew that they did circle it [p. 203].

We respectfully urge the court to read all of the testimony of the witnesses, Reeves, Tomasic and Gentle, and especially the competent cross-examination of those people, conducted by appellee's most able counsel. It is because of the impressive candor and forthrightness of the testimony, that appellants are confident that this court will accept that evidence in preference to the speculation, opinion and attempted reconstructed circumstances testified to by appellee's witnesses.

Appellee introduced the testimony of four witnesses, only *one* of whom was an experienced marine man and marine surveyor.

Permit us now briefly to consider the qualifications, abilities and the technical standing, if any, of each of those four witnesses for appellee whose testimony was apparently accepted by the trial court to the exclusion of the testimony of the master of the vessel and his two hands:

The first witness presented by appellee was Mr. Jackson, a real estate agent [p. 40]. At the time of the damage to Barge #4414, Jackson was employed by appellee as superintendent of the "graveyard" shift in charge of unloading and loading rock barges [p. 41]. He was charged with the precise duty of seeing that nothing unusual existed after the barges had been brought in and moored, and it was he, also, who actually observed the barge in question after she had been moored, and found her to be secure [p. 62]. Mr. Jackson had never served aboard ship, held no maritime license, and had merely *seen* barges moored "hundreds of times" [pp. 53, 60]. On the basis of such qualifications he was permitted, over objection [pp. 52, 53], to give opinion concerning the proper methods of mooring and the dangers associated therewith [pp. 53-54, 55-56]. That sort of testimony and that character of opinion is wholly useless and the objections should have been sustained. We submit that the court must have been unduly impressed and carried away by the glib, lengthy and very willing and voluntary dissertations of Mr. Jackson. THE ONLY direct evidence from that first witness called by appellee, related to his two patrols of the mooring area and his inspections of the bottom of the damaged barge the following day.

The next witness called by appellee was a carpenter, Mr. Bach. At time of the occurrences in suit he was yard superintendent [p. 72]. Mr. Bach testified in detail to the type of construction of mooring floats and their appurtenances [pp. 73-75]. He likewise inspected the damage to the holed barge the next day. However, upon his direct examination he placed the broken planks five feet from the *port* side [p. 77], but upon his cross-examination he altered his recollection to place the hole nearer to the *starboard* side [p. 83]; clearly not a wilfull change of position but certainly a clear indication of the unreliability of his memory. Mr. Bach was properly not called upon for his opinion concerning cause, time, etc., of the damage.

The next witness presented by the appellee was Mr. Raimer, now a superintendent upon a sewer job [p. 83]. At the time of the accident giving rise to this cause, Mr. Raimer was an assistant project manager at appellee's mole job. He assumed full responsibility for towing of rock at the job in question, including the dispatching of towboats. Such responsibility extended from the time the boat left with the empty barges, went to Catalina, were loaded, and then towed to the mainland, and he was responsible until the barges were made fast [p. 90]. Raimer, both on direct and upon cross-examinations, unequivocally assumed full responsibility and claimed full power of direction and control of the barges, which would include their mooring. Appellee's counsel went further and tried for page after page of the record to qualify Raimer as an expert to give his opinion upon the cause of the damage in question [pp. 86-88, 90-100]. At first the court consistently sustained objections to Mr. Raimer's opinions, but finally, in a confused sort of way [p.

99], permitted Raimer to give his opinion concerning the impossibility of towing the barge across the Catalina Channel with a hole in her hull of the type that was observed by the witnesses. So far as we are able to find in the record of Mr. Raimer's testimony, he never did give an opinion concerning the cause of the damage. Hence, Mr. Raimer's testimony, in net effect, cannot be said to have added anything, nor would the trial court be justified in resting any of its findings upon such testimony.

The one qualified marine man presented as a witness by appellee was Mr. Scheibe, an experienced marine surveyor. Mr. Scheibe's opinion was based upon an examination of the marks on the bottom of the barge and the hole in the hull, and upon nothing else save his attendant knowledge of the action of the waters in the harbor. In brief, his opinion was that the barge would not override the float "with the ordinary and usual conditions of the current and tide and surge in the harbor . . ." [p. 109]. *That was the sum total and the extent of Mr. Scheibe's opinion.* He did not state at any place in his testimony that the barge was pulled over or in any other manner forced upon the mooring float. When Mr. Scheibe testified [p. 107] that in his opinion "the barge overrode a mooring float and that the eye—the "U" bolt punctured the bottom planking," he did no more than to support some of the facts already agreed to in the Pre-Trial Stipulation, *viz.:* The hole in the bottom of the barge was caused by an object the shape of the U-bolt on the float. That sort of testimony does not even hint at *cause* as "cause" is here being sought. When Mr. Scheibe ruled out the action of wind and waves, currents and surges as the cause, his opinion by no means pointed to a

negligent job of mooring or improper action in that regard on the part of a towing tug. It is significant to note that Mr. Scheibe on cross-examination, in effect, agreed with the feasibility and possibility of appellants' theory relating to the short anchor chain on the float as a possible means of keeping the float too far submerged and thus making it more possible for a barge, with trim such as was the trim of Barge 4414 (high at the bow and low at the stern), to come afoul of the top of the float. He was asked [pp. 112-113]:

> "Would it alter your opinion if added to the circumstances upon which you based the other opinion were the fact that the anchor chain on the float were such as to bring that float below the water surface at some time or another, would that alter your opinion?
>
> Witness: My opinion was based on normal conditions with the float on the water.
>
> Question by Mr. Scully: Yes.
>
> A. Had the anchor chain been too short with that float submerged, then anything could happen.
>
> Q. She could possibly get afoul of that 'U' bolt, couldn't she? A. Definitely that float would be under water."

Further, Mr. Scheibe said that it was "very probable" that the barge arrived at destination (the mooring block) carrying free water in her hold [p. 114]. Add that to Mr. Scheibe's prior explanation [p. 110] about what free water will do to a craft at anchor as it shifts back and forth in the hold, and we have another possible condition based upon the physics of the problem which could result in the barge getting on top of the probably partially submerged float.

Once more we see the utility and appealing logic of that line of cases holding that proof of two hypotheses, for only one of which a defendant may legally be held responsible, has no tendency to establish the truth of *either* hypothesis and a plaintiff in such circumstances fails to sustain the ultimate burden of proof which never shifts from his shoulders.

White v. Spreckels, 10 Cal. App. 287.

In view of the state and character of the evidence in this record, and particularly recalling that appellee, concurred with by the trial court, rested upon evidence given by a real estate broker, a sewer project superintendent, a carpenter and one qualified marine surveyor who gave no positive opinion but testified on the subject of cause only in the *negative,* we submit that appellants and this court, should they desire to indulge in such, may properly likewise speculate as to what caused the hole in the bottom of Barge 4414. We therefore offer the following:

The evidence shows without dispute that Tomasic, the hand who was put aboard the barge, had ample opportunity to and did actually spend considerable time "fishing up" the fouled mooring pendant and securing it to the sampson post on the barge. It is unavoidable therefore, that the barge MUST have been very slow in the water if not actually stopped dead. That *in itself* shows due, reasonable and proper care and seamanship in the circumstances and once that is shown credibly and satisfactorily by the evidence, as we submit it was, appellants should be absolved from all responsibility. It is highly probable that any surging of the water would place the float in front of the barge at some time or another and with the barge riding high at the bow, a passing steamer or any other of a thousand possible forces might force the float

against the forward rake of the bow and impel the barge upon the float. There are a myriad of ways in which the float could get in front of the barge and an equally unknown number of outside causes in a busy harbor which could then so disturb things as to cause the barge to come afoul of the float and the float's U-bolt.

(3) The Weight to Be Accorded to the Findings and Decree Entered in the District Court.

Plagiarizing this Honorable Court's language in the case of *United States v. Johnson,* 160 F. (2d) 789, 792, we are fully aware that the record and the findings below come to this court "encased in their usual armor." Appellants have prosecuted this appeal with full cognizance of the repeated and established principle that the findings of the trial court signed, after a trial in which witnesses personally appeared, are given great weight. Nevertheless, it is equally the law established by the Circuit Court of Appeals for the Ninth Circuit, and in other circuits, that the weight to be given to the trial court's findings varies with the character of the evidence given below.

The old case of the *Ariadne,* 13 Wall. 475, 479, 20 L. Ed. 542, 543, has been reaffirmed many times and is still respected in this and in other circuits. In answer to the broadside always fired with great gusto by appellees to the effect that there is a presumption in favor of the findings below when entered upon conflicting evidence, the United States Supreme Court, in the *Ariadne* case, above, said:

> "We are not unmindful that both the Circuit and District Courts came to a conclusion differing from ours as to the alleged fault of the steamer.
>
> Their judgments are entitled to and have received our most special full consideration. Their concur-

rence raises a presumption, *prima facie,* that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. *The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought and judgment.* Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us, by declining to give our own judicial effect." (Emphasis supplied.)

This court quoted language from the *Ariadne* opinion in the United States Supreme Court in the case of the *Ernest H. Meyer,* 84 F. (2d) 496, 501, and reaffirmed the principle therein by pointing out that Admiralty Rule 46½, 28 U. S. C. A. (following Sec. 723), relating to the making of findings, did nothing more than change the old rule under which the District Court's admiralty decree was regarded as wholly vacated by an appeal. The gist of this court's decision in the *Ernest H. Meyer* case, *supra,* is that the Circuit Court in such an appeal as now before it, will weigh the evidence with a *rebuttable prima facie* presumption that the District Court findings are correct. The value of the presumption is affected by the amount of testimony below and the character of the evidence. In the case at bar, credibility is not primarily under investigation. It is more like the case of one tried upon depositions because this Honorable Court is called upon to review the accuracy and correctness of the trial court's deductions and rationalization. We are not unmindful of the fact that the evidence in the case of the *Ernest H. Meyer* was by deposition. Even so, however, the rules on the point of the weight to be given to trial court findings in an Admiralty appeal are well an-

alyzed, discussed and entirely applicable in the instant inquiry.

The *Russell No. 3,* 82 F. (2d) 260, 263, was also quoted by this court in the *Ernest H. Meyer* case, above. The correctness of a commissioner's finding was under attack there. Judge Learned Hand said:

> "While it is entitled to be treated as 'presumptively correct . . .' there is a point after which we must assume responsibility for the facts; we think this is such a situation . . ."

The District Court decree was reversed.

Reverting to a discussion of the case of the *Ernest H. Meyer,* 84 F. (2d) 496, Mr. Justice Denman of this Honorable Court analyzed *McCrea v. U. S.,* 294 U. S. 382, 383; 79 L. Ed. 933, and reached the conclusion that the present rule of the United States Supreme Court still means that the *whole evidence* upon an Admiralty appeal is to be weighed and that the record is not to be examined merely to discover *some* evidence to justify the District Court's findings, *i. e.,* the proceeding upon Admiralty appeal is not the same as that had upon a Writ of Error.

In *Great Atlantic & Pacific Tea Co. v. Brasileiro* (*The Pocone*), (C. C. A. 2d) 159 F. (2d) 661, Certiorari Denied, 91 L. Ed. 1849, 331 U. S. 836, appeals were taken from a decree in a proceeding by an owner to limit liability for damage by fire and water to the cargo carried by the POCONE. The trial court found the master and crew to have been negligent, but refused to impute fault or negligence to the owner through owner's Traffic Manager and Port Engineer. The pivotal issue important to our inquiry, and which makes the case germane to the case at bar, was the holding below (reversed on appeal), to the

effect that the owner's Port Engineer, Borges, was not negligent and that therefore the owner of the vessel was exonerated. What was done and what occurred at the material times in connection with the fire aboardship was fully shown by the record below.

Judge Hand, writing for a unanimous court, reversed and remanded the case because of disagreement with the finding by the trial judge to the effect that Borges was not negligent. That portion of the holding states (p. 665 of 159 F. (2d)):

> "This runs counter to one of the findings of fact, so named; but a finding of negligence is not a finding of fact which must be 'clearly erroneous' to be subject to review. It sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage. It is true that, when the wrong is not deliberate, the occurrence of the loss or damage by hypothesis involves a factor of probability and it may be argued that probability is a question of fact. Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values: the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act. Certainly such a decision is not like a decision of fact uncolored by any element of choice or fiat. We are therefore free to exercise our own judgment upon Borges's conduct and we hold that he was negligent . . ."

Neill v. Hill, 32 Ga. App. 381, 123 S. E. 30, is an apt authority on an appeal such as this:

> "(a) The testimony of witnesses who swear positively, and are not otherwise impeached or discredited,

should not be discarded merely because they are related to the party in whose behalf they testify, although such relationship is proper for the consideration of the jury when there is other matter by reason of which they may legitimately question the credibility of the testimony. (Cases cited.)

(b) A fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable and unimpeached testimony that the fact does *not* exist. (Cases cited.)" (Emphasis supplied.)

In terminating discussion of this phase of argument appellants urge this court to give to all of the evidence that independent examination, thought and judgment to which the United States Supreme Court has said an appellant in Admiralty is entitled and to which this court has on so many occasions consistently adhered. We are confident that when the clarity, reasonableness and convincing credibility of the witnesses having direct knowledge of the facts is examined, the contrast with the unsatisfactory evidence introduced by appellee will leave no question in the court's mind but that the trial court's findings and decree cannot possibly be upheld on any reasonable or logical basis.

Finally, we hope that the court will not lose sight of the fact that the findings and decree were neither prepared nor altered in any material respect by the court. They were signed as drafted and presented by appellee's counsel. That practical aspect is important and properly considered when the contention is advanced that the trial court's findings and decree are controlling. Every attorney can be expected, in such circumstances, to try to protect his success in the trial court by drafting "air tight" findings.

B.

Appellee Wholly Failed to Establish by Direct Evidence or Otherwise That the Damage to Barge No. 4414 Proximately Resulted From a Cause for Which Appellants Were Responsible or During the Period Terminating With the Due and Proper Completion of the Towing Engagement, i.e., the Mooring.

Errors 8, 9, 11, 12 and 13 [p. 32], 20, 22 and 24 [p. 33], are applicable here and are as follows:

8. The District Court erred in finding that the loss of the cargo of Barge 4414 and the damage to Barge 4414 were caused solely, or at all, by the negligence of respondent, Tug ROCONA.

9. The District Court erred in failing to find that libelant was negligent in respect to the manner, method and condition of loading Barge 4414, and in failing to find that libelant was negligent in providing, furnishing, and maintaining the mooring float, all as alleged in the Answer to Libel filed by respondents and claimant.

11. The District Court erred in holding that Barge 4414 sustained damage to her hull during the time said Barge was in custody of respondents, and prior to the completion of delivery of said Barge to the mooring float furnished and maintained by libelant.

12. The District Court erred in holding that Barge 4414 sustained damage prior to the time respondent, Tug ROCONA, departed from the scene of the mooring.

13. The District Court erred in failing to find that the anchor chain attached to the mooring float was too short to constitute a safe and proper mooring facility.

20. The District Court erred in finding that Barge 4414 began to take water and within an hour after mooring was discovered to be in a sinking condition.

22. The District Court erred in holding that neither Barge 4414 nor libelant, or either of them, committed any fault or negligence in respect to the matters and things alleged in the Libel.

24. The District Court erred in holding that the damage to Barge 4414 was proximately caused solely by the negligence and fault of respondent, Tug ROCONA.

This subdivision of appellants' brief deals with appellee's failure to sustain that ultimate burden of proof of negligence which always rests upon the plaintiff and never shifts. The old and familiar rule of "he who affirms must prove" is inherent in this action as it is in all such actions of similar character. Rules of presumption and inference, which are discussed more at length in connection with the doctrine of *res ipsa loquitur* under Subdivision C of this brief, are merely ancillary and subordinate aids to proof. It is settled that presumptions and inferences are never *in themselves* substitutes for evidence and proof, as such.

It will presently be demonstrated that there is no presumption of fault from the mere happening of an accident. However, it is first important to recognize the limits of duty and responsibility which rested upon the tug and those in charge of her. Once the "ROCONA" brought her tow (Barge 4414) to the place of final destination and moored her safely to an apparently safe facility, any damage *thereafter* occurring and not proximately related to the time and the act of mooring, is at the risk of the barge and her owners and not that of the tug.

In the *Eastchester*, 20 F. (2d) 357, 358, the charge was negligent mooring in an unsafe berth. The Circuit Judge writing the opinion said:

> "The tug having fulfilled her towage contract by delivering the barge to the consignee, without objection to the berth by consignee or by bargee, the risk in allowing the barge to remain in the position she was in when the tug departed was not the tug's."

There is not one word of evidence of a direct character, or of a nature which would justify a logical inference to the effect, that the hole in the bottom of the barge occurred before the departure of the "ROCONA." On the contrary, all reasonable evidence, especially the testimony given by appellee's witness, Jackson, who saw the barge at the float at a time when she was in no difficulty and after the mooring was completed, points to the occurrence at a time subsequent to the completion of the mooring.

The case of *Schoonmaker-Conners v. New York Tidewater Gravel Corp.*, 11 F. (2d) 470, was cited as authority for the quotation set forth above from the *Eastchester*. The Circuit Judge writing the opinion said:

> "If there was a risk in allowing the barge to remain in the position she was in when the tug departed, it was not the tug's (cases cited). The tug's duty was to take her as near to the dock as she safely could. There was no obligation to stand by."

Although a District Court case in which no appeal was apparently taken, *King v. Red Star Towing and Transportation Co.*, 48 F. (2d) 633, 634, 635, is a most appropriate citation. Its language and the clear logic of the opinion should have its appeal to an Appellate Court.

The sole witnesses for the libelant in that case were the owner, who was not present at the time of towing, and a marine surveyor who subsequently surveyed the damage. Citing *Aldrich v. Penn. R. R. Co.,* 255 Fed. 330, 331 (C. C. A. 2d), the District Judge stated:

> "The mere fact that the Mifflin sank sometime after she had been tied up, and the tugs had departed, is not sufficient to prove negligence."

Further:

> "The only duty resting on respondent was to take the Mifflin to a reasonably safe berth and, she having no captain on board, to tie her up in a seamanlike manner. The *Brittania* (C. C. A.) 252 Fed. 583 . . . If respondent was without fault in placing her at her berth, the subsequent cost of raising her, to get her out of the way, cannot be charged to it."

Obviously, appellants are not here contending to this Honorable Court that had the evidence shown or justified an inference that the "Rocona" and those in charge of her did not perform properly when mooring Barge 4414, liability would not rest upon the appellants. We submit, however, that not only was there no direct evidence and no evidence justifying such inference, but that the evidence greatly preponderates in favor of appellants on the issue of due care and proper seamanship at time of mooring.

It is unnecessary to extend further the citation of authorities that in order to hold the appellants on the basis of negligence the damage must have been proven to have resulted from an act or omission for which appellants were responsible. The record is wholly devoid of evidence on

that score. The tug's duty as tower ceased when it moored the barge properly to the mooring facility provided by appellee. From the speculative standpoint, the fouling of the barge on the mooring float likely occurred by reason of the float being held either partially below or just at the level of the water. If that be the case, as is entirely probable, appellee cannot complain, because the mooring belonged to and was furnished by the appellee.

Although liability was found to exist upon the facts of the case, the *Ashwaubemic,* 3 F. (2d) 782, 783, clearly affirms the universal rule that the burden of proving negligence perpetually rests upon those who seek to establish the tug's liability. Negligence is *never* presumed from the mere happening of the accident. The case also holds that the tug is not an insurer of the safety of the tow, nor is she responsible for errors of judgment on the part of the master, if a competent seaman exercising due care.

Significant of the mental approach to the proof and to the case at large on the part of the learned trial judge in the District Court, and from which we submit he was never able wholly to divorce himself, is his question when the evidence was concluded concerning the application of the rule of "highest degree of care" to the case [p. 209].

We have cited *Aldrich v. Penn. R. R. Co.,* 255 Fed. 330, above. That case was decided in the Second Circuit in 1918. The familiar universal rule of burden of proof to prove negligence continually resting upon the one who asserts it was applied and affirmed upon the following facts:

The master of the tow testified that when he went to bed the barge was in good condition and undamaged at the place, where it was subsequently discovered, it had

met with violence. The tow was tied up and the first information concerning a collision was had at 8:00 o'clock the following morning, when, upon coming on deck the master's attention was called to a hole "large enough to walk in and out"—on the port side. Three planks running fore and aft were broken. The testimony was silent as to a collision of any character and the master of the tug which did the towing testified that there was no collision or bumping of any character. The appellant sought to infer negligence from those circumstances. The Circuit Court affirmed the District Court and refused to make such an inference on the ground that the appellant failed to sustain the burden which was cast upon him of proving negligence in the performance of the towing operation.

We think that the above case is a very strong one on its facts. It will be observed that in affirming the District Court's decree the Circuit Court in the *Aldrich* case, above, did not rest such affirmance upon the weight of findings below, nor upon the conclusive nature of the District Court's decree. It weighed the evidence directly and reached an independent judgment.

Another applicable authority is the case of *Higgins, et al., v. Gypsum,* 67 Fed. 612-614 (C. C. A. 2d). A collision occurred between two sailing vessels. The facts were undisputed, The Tarbell, loaded, was sailing close-hauled on the starboard tack. The Gypsum Prince was running free on the port tack. The Tarbell was the privileged vessel. It was the duty of the Gypsum Prince to keep out of her way. For a collision happening under those circumstances the burdened vessel (the Gypsum Prince) is to be held responsible unless the cause was inevitable accident or some fault of the privileged ves-

sel. The District Court found that both vessels were at fault. The Circuit Court reversed the decree below and held the GYPSUM PRINCE to have been solely responsible. The Circuit Court considered the evidence in all its aspects in a careful and analytical manner. The District Judge said that it was extremely difficult from the testimony to find any satisfactory and certain explanation of how and why the collision occurred. He therefore indulged in theorizing and deducing (as did the learned trial judge in the case at bar), in an effort to determine the cause from the circumstances.

The following quotation is from the Circuit Court's opinion and illustrates that court's view of how the evidence *should* be weighed. From the case of *The Alexander Folsom,* 52 Fed. 403, the Circuit Court, in *The Gypsum Prince* case, quoted:

> " 'The established rule is that the testimony of officers and witnesses as to what was actually done on board of their own vessel *is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observations.*' " (Emphasis supplied.)

The Circuit Court (reversing the District Court), then went on:

> "This does not mean that a vessel is to be held free from an alleged fault whenever her officers and crew testify that they did not commit it. But when their evidence is given under circumstances which are calculated to bring out an independent story from each witness, when it is in accord with what would have been the natural course of events, when it is direct and positive and consistent, it is a safe rule to follow that it shall not be set aside because the testi-

> mony of observers on the other vessel as to color and bearing of lights will not harmonize with it. And even on appeal, in a case where the district judge has seen and heard some of the witnesses, such testimony should still be accorded its proper weight, especially when, as in this case, his finding has been apparently in part induced by a misplacing of the testimony."

In the *Pride,* 135 F. (2d) 999 (C. C. A. 2d), the District Court's decree was reversed on the ground that the evidence did not sustain the findings, that damage to the barge resulted from navigating too closely to consignee's dock. There the finding of fault rested "upon a possibility which appears to approach a likelihood insofar as no other cause of the damage was shown." Nevertheless, the court said:

> "However, such thoughts as these but show how much speculation must underlie any attempt on the evidence in this record to attribute the injury to the barge to some specific cause. This leaves the libelant without proof of any cause of action. The *Tracy* was not an insurer of its tow and can be held only if its negligence is affirmatively shown (citing several cases)."

Appellants have previously referred to the failure of the evidence to show *how* and *when* in reference to the cause and time of the damage to Barge 4414. The District Court's findings and decree (both signed in form prepared by appellee), when analyzed in the light of the evidence in the record, obviously proceed upon the theory that the "how," the "when" and the other constituent elements of the case relating thereto, were for the appellants to establish, identify and explain. Under the

settled law which has been shown above, and which hardly needs citation of authority, such an approach to this case is fatal to a finding of liability. The reason?—because the ultimate burden of proving negligence never shifts from the libelant (appellee) regardless of interim shifting of the burden of going forward with the evidence. It certainly was not a duty of appellants to identify the precise cause *or* time of the injury to the tow. To rest content with the statement that the cause of the hole in the barge was the U-bolt on the mooring float would be pure superficiality and sophistry. The quest in the case is not the instrumental cause but the *legal* cause.

The appellee has not met the clear requirements of a plaintiff in a tort action by merely proving the nature of the physical damage and the opinion of a marine surveyor that the damage *was not caused* by the action of the tide and surge of the water. In just a few words, that constitutes the entire extent of appellee's proof in the District Court.

Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720, 724 (Note 6), cited in *The White City,* 285 U. S. 195, 76 L. Ed. 699, was not in Admiralty but it was a negligence case and burden of proof was one of the points decided. Supported by other respectable authorities it quoted Mr. Justice Taft, who was then sitting in the Circuit Court, speaking in *Ewing v. Goode,* 78 Fed. 442, 444, as follows:

> "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither."

We have already referred to the case of *White v. Spreckels,* 10 Cal. App. 287, deciding virtually the same

point, *i. e.*, when it appears that the injury may have been occasioned by one of two causes, for one of which defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause, *or leaves it as probable that it was caused by the one as the other.*

The same idea was the subject of a well written opinion in *Hughes v. Cincinnati, etc., Ry. Co.,* 91 Ky. 526, 16 S. W. 275. The producing cause of death was in doubt. Said the court:

> "We are left to theorize as to it. One suing to recover for damages for injury arising from another's neglect must offer some testimony conducing to show that it was so occasioned. Negligence cannot be presumed in a case like this one. The presumption is the other way . . . He (plaintiff) has merely presented two or more states of case upon which one may theorize as to the cause of the accident."

In the *Lizzie D. Shaw,* 47 F. (2d) 820, the Circuit Court for the Third Circuit reversed the District Court and ordered the libel to be dismissed. Following a detailed analysis and consideration of the record below, the Circuit Court concluded that those who asserted negligence (the libelant) failed in the "central phase of the controversy" by failing to sustain the burden of proving negligence on the part of those in charge of the tug. The opinion stated that the tug should be absolved if the master acted "not with the highest degree of skill and care . . . but with reasonable skill and care and in the exercise of the reasonable discretion of experienced navigators." Negligence not being presumed, appellee bore the burden of negativing that issue—and failed to sustain such burden.

C.

The Deductive Process of Decision Employed by the Learned Trial Judge Is Fatal to the Findings and Decree Because Founded Upon Unproved Speculation and Conjecture. There Is Nothing in the Record to Show When the Injury Occurred.

(1) *Res Ipsa Loquitur* is not applicable because:

a) Appellants were not shown to have had exclusive control of the "instrumentality" at time of injury.

b) The facts do not warrant an inference of negligence on the part of appellants.

Errors 14 and 15 [p. 32]; 17 and 18 [p. 33], and 27 [p. 34], are applicable here and are as follows:

14. The District Court erred in presuming and inferring that respondents were negligent and through such negligence caused damage to Barge 4414, upon the basis of the speculation, conjecture and inference, which was not proven, that the said Barge 4414 sustained such damage prior to the time the respondent, Tug ROCONA, departed from the scene of the mooring.

15. The District Court erred in placing the burden of proof upon respondents and claimant to show that respondents were not negligent in towing and mooring Barge 4414.

17. The District Court erred in applying the presumption of *prima facie* negligence against respondents and claimant upon proof of circumstances by libelant.

18. The District Court erred in holding respondents to have been negligent in the mooring of Barge 4414 and in holding that said respondents caused damage to

said Barge, by basing said holdings and findings upon speculation and conjecture.

27. The District Court erred when, in effect, it implicitly applied the doctrine of *res ipsa loquitur* in deciding this cause.

It is manifest from the findings and the evidence in the record that the trial judge necessarily based his decision not upon direct evidence of the supposed negligence, but upon what he reasoned to be compelling circumstantial evidence, inherent probabilities, deductions and inferences.

Appellants steadfastly maintain that the learned judge's process of decision was inherently faulty and could be no more than speculation and conjecture.

Much of the argument and many of the cases in the next preceding subdivision B of this Section IV of the brief (ARGUMENT OF THE CASE) are germane to this subdivision C. The court having that material in mind by the time it reaches this portion of appellants' brief, our conscious effort will be exerted to avoid unnecessary repetition. As argument progresses hereunder the partial blending between subdivision B and this subdivision C will be apparent.

Essentially prerequisite to examination of the trial judge's process of decision, is the noticing in general outline of the elements which were before him at the conclusion of the case and after all of the evidence on both sids had been introduced:

> (1) The trial judge knew in detail, on the basis of the Pre-Trial Stipulation of facts and the testimony of witnesses who saw it, the location, extent, nature and description of the physical damage to the bottom of Barge 4414;

(2) The trial judge likewise learned from appellee's witness, Jackson, the real agent, who, at the time of the damage, was foreman of one of the shifts on the land construction, that subsequent to the act of mooring and the departure of the "ROCONA", the barge was all right and resting normally and easily at her mooring and that approximately an hour and a half after the mooring (which Jackson did not observe and did not know exactly when it took place), the barge was observed to be listing and sporadically jettisoning her load of rock;

(3) The judge of the District Court further had before him the "personal opinion" [pp. 26, 31] of Mr. Jackson, who is obviously not qualified to express an opinion upon the subject, that the damage to the barge was caused by her being "pulled over the mooring float" [p. 60]. This, in comparison to Finding V [p. 23], to the effect that the barge *drifted* over the float;

(4) Finally, the trial judge heard the opinion of the sole qualified marine man, but an opinion only in negative form, *i. e.,* the overriding *was not caused* by the "ordinary and usual conditions of the current and tide and surge in the harbor" [p. 109].

There is no necessity here further to analyze the evidence of those in the best position to know positively and directly how the mooring was accomplished. That has been done in subdivision A(2) of this Section IV (ARGUMENT OF THE CASE).

The gist of appellants' thesis here is that the trial court built its conclusion of what is supposed to have happened upon a group of unproven presumptions—one placed upon

another. True, the *modus ratiocinari* of "presumption upon presumption" is not universally condemned by all courts when the rule is stated in that general form. However, in dialectics as well as in physics the chain is never stronger than its weakest link; and no court that we know of has approved the basing of a presumption upon a presumption, when the prior presumption upon which the conclusion depends has not been proved and clearly established. A fact in the nature of an inference may, upon occasion, be taken as the basis of a new inference, *provided,* the first inference has the required basis of a proved fact. Until chances of error are eliminated in an inference, it forms an unsound foundation for a second inference. Since such evidence consists in reasoning from known and proven facts to establish such as are conjectured to exist, the process is "fatally vicious" if the circumstances from which we seek to deduce the conclusion depend *also* on conjecture and speculation: Cite: *Jones "Commentaries on Evidence,"* 2nd Ed., Section 11, Vol. I, page 22. Professor Jones also states in the above work (pp. 74-77), that often pure factual inferences are based on circumstantial evidence and are drawn from all of the proof—those are frequently called "presumptions of fact." However, they are not *rules of law* but are really only in the nature of argument, which therefore becomes weak when compared with direct evidence which is reasonable and not discredited.

We submit that no lengthy illustration of the applicability of the foregoing to this controversy is called for. Nevertheless, we might merely point out that even if proven (which was definitely not done), that the damage to the barge occurred during the time when the Rocona was in charge of her, that in itself would be no basis at

all for presumption or inference that the ROCONA was negligent or in any way *caused* the damage. It is clear from previous argument (and the rule is indisputable), that no inference or presumption of fault whatever may be drawn from the *mere fact* of the *occurrence* of injury. Neither does any possible conception of the duties of proof resting upon appellants demand the discernment or demonstration of the actual cause of the holing of the barge by the U-bolt on the float.

The trier of the fact, while admittedly entitled to certain latitude in weighing the proven facts and circumstances, is nevertheless bound both in reason and in law to find some justification and reasonable certainty in the evidence to support its chain of reasoning. "Hunches" and ill-defined "feelings" engendered by a review of the evidence, do not furnish valid support for an uncontrolled and undirected flight of "reasoning" and "deduction" such as is supposed to have taken place in this suit.

Jackson's *opinion* is worth nothing. Even he characterized it as his "personal opinion" (pp. 56, 60), thus unconsciously indicating that even he himself did not value it too highly. Scheibe's opinion was restricted and negative in nature and did no more than *exclude* the effect of the ordinary and usual conditions of the current and tide and surge in the harbor from the causal field. The type, location and character of the physical damage bears no relation whatever, inferential or otherwise, to the "how" or the "when" of the barge coming on top of the float.

One may not justly presume (or infer) that Barge 4414 was in charge of the ROCONA when damaged and at the same time further presume (or infer) that the damage occurred by virtue of a "towing over" or permitting

the barge to drift over. The language in *The Albany,* 81 Fed. 966, 968-969 (C. C. A. 2), which case is still good law, and is still frequently used, might well have been written for this case. The case concerned a collision between ferry boats. The question for decision was placing the fault upon one or the other of the vessels involved, or apportioning such fault. The District Court held both vessels at fault. Only the libelants appealed. The Circuit Court reversed the District Court, with directions to decree damages against the respondent vessel alone. On the question of consideration on appeal of conflicting evidence, the Circuit Court said:

> "When the district court has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact, and has accepted the testimony of others whose opportunity to know the truth was manifestly not as good, and does this on the expressed ground that the testimony rejected does not harmonize with some theory as to the movements of the vessels or with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such fact. The 'personal equation' of the witnesses is of no assistance in determining what are or are not the probabilities of the case." . . .
>
> "Such a finding as to the Susquehanna's navigation is a finding that her pilot and wheelsman testified falsely when they must have known the truth. We have most carefully examined the testimony of these two witnesses. It is clear and apparently straightforward, both on direct and cross-examination, and presents no inconsistencies. We do not find that it conflicts with the proof as to the place of collision, or the course of the Hamburg."

The foregoing was a case of so-called "inherent probabilities" conflicting with the testimony of satisfactory and candid witnesses who were not impeached upon cross-examination. The Circuit Court held that the failure of the rejected testimony to harmonize with a theory or with inherent probabilities of the case, was no reason why the Circuit Court could not review the testimony unembarrassed by the findings below and reach a contrary conclusion.

In *Globe Accident Insurance Co. v. Gerisch,* 163 Ill. 625, 45 N. E. 563, 565, the court disapproved the basing of one presumption upon another in a train of circumstances basically similar in nature to those found in the record of trial of the instant cause. It was a suit upon an accident policy resulting in a plaintiff's judgment entered immediately after defendant's demurrer to the evidence was overruled. The Supreme Court of Illinois reversed the judgment upon appeal. Deceased was in the habit of carrying out ashes every evening and on the evening of the abdominal and intestinal injury from which he died he was seen shoveling ashes into a wooden box in which he usually carried them out. The ashes were shown to have been carried out that evening, but no one saw deecased lift the box and carry them out. Physicians testified that in their opinion, the intense intestinal inflammation was superinduced by some strain or external violence. The court held that the presumption that the deceased lifted the box of ashes could not be indulged in favor of the *further* presumption that death ensued from the injury thereby sustained. "For", said the court, "there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption," citing

among other cases, *U. S. v. Ross,* 92 U. S. 281, 23 L. Ed. 707.

The court in the *Globe Accident Insurance Co.* case, above, refused to find that the missing link was established by presuming that Gerisch lifted the box and then further presuming that such was the cause of his internal injury. Similarly, "there is no open and visible connection," in our case between the towing of the barge, mooring her and the subsequently discovered hole in the bottom. The *time* of the damage is one of the great unknowns in this appeal. Just because the ROCONA took the barge to the float and moored her and then, at least an hour and a half later, damage was discovered, requires pure and unadulterated speculation and conjecture if one goes further and supposedly "infers" that the tug negligently towed the barge over the float or permitted her to drift over it.

In *U. S. v. Ross,* 92 U. S. 281, 23 L. Ed. 707, claim was made upon the United States Treasury for funds derived from captured or abandoned cotton. The U. S. Supreme Court reversed the Court of Claims because it was not shown to have been a fact that the identical captured cotton from the plaintiff ever came into the hands of a U. S. Treasury Agent or that it was sold and the proceeds covered into the Treasury. The presumption that the plaintiff's cotton was a part of that proven to have been transmitted and sold, was held to have been unwarranted. Mr. Justice Strong speaking for a unanimous court said, in part:

> "There must be evidence connecting the receipt of it (the cotton) by the Treasury Agent with the payment of the proceeds of sale of that identical property into the Treasury."

In consonance with the views of the United States Supreme Court above, and further shown in the *White City* case shortly to be cited, there must be *evidence* and not guessing to connect the damage to the act of mooring—not an unwarranted attempt to infer fault and all that goes with it from mere evidence of control by the tug at a time at least an hour and a half before the damage was discovered.

We respectfully urge this Honorable Court to read the opinion by Judge Learned Hand in reversing the District Court in the *White City,* 48 F. (2d) 557 (C. C. A. 2), 285 U. S. 195, 76 L. Ed. 699, and also the opinion of Mr. Justice Butler speaking for a unanimous United States Supreme Court in affirmance of the Circuit Court's decree of reversal. The facts and the contentions in the *White City,* above, are strikingly parallel to those in this appeal. The claimants did not prove when or how the accident happened or anything except the course taken, etc.; and that in the morning the craft was in the same condition as when the tower took over and that upon arrival after the towing the planking on the starboard side was broken. Claimants attempted to rely upon presumption of negligence from the mere fact of redelivery of the yacht in damaged condition. Both the Circuit Court and the United States Supreme Court held that the testimony was "too scanty" to support the presumption and to extend it to requiring explanation of how the injury occurred or that it was not caused by the tower's neglect. Just as in the incident case great reliance was placed upon the towage contract, but it was unequivocally held in both the Circuit and the United States Supreme Courts that the yacht was not in bail to the tug and that no presumption of fault arose from the happening of the damage. The ultimate

burden perpetually rested upon the claimants to show that the loss was caused by breach of the tower's duty.

Per Mr. Justice Butler (p. 704 of 76 L. Ed.):

> "The burden of proof as to respondent's negligence remained upon petitioner throughout the trial. His contentions clearly show that the evidence leaves the time, place and cause of the injury in the realm of conjecture. The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either."

Another case was referred to in the *White City* case in which the contention was advanced that the claimants were in an inconvenient and complicated situation because, to establish the allegations of the libel, it was necessary to resort to those navigating the tugs and to the evidence given by interested witnesses anxious to exonerate the vessel to which they were attached. Mr. Justice Butler quoted from that case: "We are not aware, however, of any ground on which such inconvenience can affect the rule of law which governs the rights of the parties." Though justified by the importance and application of the *White City* case, we do not wish further to extend the volume of this brief by lengthy quotations from the opinions in both of the upper courts.

1. *Res ipsa loquitur is not applicable because:*

   (a) Appellants were not shown to have had exclusive control of the "instrumentality" at time of injury.

   (b) The facts do not warrant an inference of negligence on the part of appellants.

The prime reason why *res ipsa loquitur* cannot avail to supply deficiencies in appellee's proof is stated in (a) above. Our prior argument under this subdivision C of the ARGUMENT OF THE CASE on the subject of presumptions based upon other presumptions and unwarranted inferences and deductions, is likewise applicable at this point because: To establish the first essential element of the applicability of *res ipsa loquitur* it would require this court to presume, first, that the damage occurred while the ROCONA was still at the scene or that such damage proximately resulted from an act or omission on the part of the ROCONA while at the scene and, *further,* that there was a direct causal connection between some act or omission on the part of the tug and the occurrence of the damage.

As Professor Shain, in his work, *"Res Ipsa Loquitur"* (1945), so clearly points out on page 5 of his work, the plaintiff must always and at the outset prove:

> (a) The "thing" is part of a causal chain connecting injury to the plaintiff to the act or omission of the defendant, AND
>
> (b) The "thing" is within the exclusive control of the defendant, AND
>
> (c) The "thing" does not ordinarily occur if the one having exclusive control of it uses proper care in exercising that control.

In his footnote on page 10, Professor Shain points out that it is of the essence of the doctrine that the court takes judicial notice of (c), above, only AFTER the plaintiff has *first* proved (a) and (b) above.

There is no evidence whatever in the record before this court that the damage occurred at the time of mooring nor that it resulted directly and proximately from an act or omission at the time of mooring. In the case at bar, the finding in favor of appellee inherently includes a conclusive presumption, before the appellants spoke through their evidence, that not only was the ROCONA negligent in the mooring but *also* that the injury occurred directly and proximately from some act committed or omitted *before* the ROCONA released control of the barge to the mooring facility furnished and maintained by appellee.

It may be denied that *res ipsa loquitur* was applied in this case by the trial court. But see the Court's remarks on pages 208-209 and 211. We can find no escape from the conclusion that the doctrine was, in fact, applied at least subconsciously in the mind of the court. Appellee gave no evidence of negligence on the part of anyone. It merely proved the towage engagement, the place and the character of the damage. Appellee's evidence does not constitute evidence of negligence *per se,* it is merely proof of circumstances from which appellee prayed the court to infer (*i. e.,* presume), negligence on the part of appellants.

At this point in the examination of whether the doctrine of *res ipsa loquitur* is applicable to the case, we call attention to the very recent decision of the California District Court of Appeals for the First District: *Larson v. St. Francis Hotel,* 83 Adv. Cal. App. 266, 188 P. (2d) 513. Although a State case, the application of the doctrine to the facts is nonetheless orthodox and in conformity

with the universal view. Plaintiff was non-suited at the conclusion of her case in chief, and the judgment of non-suit was affirmed on appeal. On V-J day during the celebration in San Francisco she stepped from under the marquee extending over the sidewalk in front of the St. Francis Hotel and was struck on the head by a heavy, upholstered chair. No evidence identified the source from whence the chair came, but faithful to the rules requiring all favorable inferences to be indulged in favor of a non-suited plaintiff, the court assumed that it came from the hotel. Application of *res ipsa loquitur* was disapproved because exclusive control of the instrumentality (the chair) by the defendant hotel, either actual or potential, was not shown. The court mentioned that guests have at least partial control. The California District Court of Appeal adhered to the same rule which we have previously mentioned on a couple of occasions, viz: when it appears that the injury was caused by one of two causes, for one of which defendant is responsible, but not for the other, the plaintiff must fail if the evidence fails to establish that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other.

The real burden of proof always rests upon the plaintiff and the effect of applying *res ipsa loquitur* is merely to say to the defendant: "It is your move to explain and rebut." When the scales are at even balance the finding must be against fault. Up to the time that the defendant puts in evidence, all that the court has under the doctrine

of *res ipsa loquitur,* is an hypothesis based upon circumstances. Hence, the proper conception of the application of the doctrine in net effect is merely, at the proper stage of the proceedings, to shift the burden of persuasion.

In all *res ipsa loquitur* cases the *cause of the accident* must be first clearly connected with the defendant as being by his act or under his control before a court may thereafter properly indulge in the presumption of negligence (Jones "Commentaries on Evidence," 2nd Edition, page 138). Professor Jones further says at page 139 of his work: "*Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense." That is to say, properly considered, the doctrine only means that—with all other evidence in the case—there is some basis furnished from which the trier of the fact may infer the ultimate fact of negligence. A plaintiff's verdict may be *warranted* by the doctrine but it is never *compelled* by the rule. At page 139 Professor Jones deprecates the use of the word "presumption" as unfortunate. He demonstrates that *res ipsa loquitur* is nothing more than a label for the principle that in certain cases a court may, *from proven facts,* infer the ultimate fact of negligence.

The inherent vice in the reasoning process of the trial court, we respectfully submit, is that by employing the process of reasoning by exclusion, the learned trial judge did not (and, of course, he could not) cover all causes which due care on the part of the appellants might have prevented.

We are not unaware of two cases in the United States Supreme Court, the second of which arose in the Ninth Circuit, and both of which bear upon the doctrine of *res ipsa loquitur,* viz: *Jesionowski v. Boston & Maine Ry. Co.,* 329 U. S. 452, 91 L. Ed. 416; and *Johnson v. The United States of America,* 92 L. Ed. (Adv. Op.) 360 (decided February 9, 1948, official citation unavailable). However, neither of those cases is at variance with the principles contended for above and the facts are certainly of no assistance whatever. Should appellee choose to rely upon either or both of such cases in its reply we shall then, of course, be afforded the opportunity to offer further comment in appellants' closing brief.

Wholly aside from any and all of the considerations treated thus far on the subject of *res ipsa loquitur,* and sufficient in itself completely to foreclose the application of the rule, is the showing through appellee's witness, Raimer, that though not physically present he was, nevertheless, clothed with both responsibility and power of control of the mooring and the hauling of rock during material times here in question. He was on 24 hour duty, and subject to call [p. 84]. He was responsible for the tows until they were made fast, and if an accident happened in towing, or part of a load was lost due to a marine accident, it was up to him "to come up with the answers as to what happened" [p. 90]. Further elaboration of his position in that regard occurs on pages 91, 92, 95-96 of the record. It is wholly immaterial whether Mr. Raimer actually exercised his control and powers of di-

rection in this instance or whether he was actually present, so long as he was charged with the duty and clothed with the authority, which he so clearly and minutely demonstrated by his testimony, both upon his direct and his cross-examinations.

Hence, we repeat that Mr. Raimer's position alone would put any consideration of the doctrine of *res ipsa loquitur* wholly out of the case and destroys that essential element of exclusive control of the supposed instrumentality.

Conclusion.

Appellants respectfully submit that as careful as the District Judge was to reach a just conclusion, he was unwittingly led astray by his unfamiliarity with maritime matters and maritime cases,[1] and by his expressed feeling, aided by counsel's statement immediately thereafter, that possibly the *highest* degree of care is the measure of responsibility [p. 209].

We have shown that the record is wholly devoid of any acceptable opinion evidence in support of the findings and decree and, further, that the findings and decree are entirely at variance with the direct, reasonable and unimpeachable evidence of the due performance of duty by appellants. The District Court's sincere attempt to ration-

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[1]The Court: "I have a great deal of difficulty in expressing what I have in mind in regard to trying to use these terms, because I do not have enough of these cases to be very familiar with them." (Page 125.)

alize, to deduce and to reason by exclusion from the physical facts, etc., under the evidence in the record, rises to no higher dignity than that of guessing, speculation and conjecture. If the case was to be decided upon pure speculation, it is submitted that a finding of contributory fault on the part of appellee in the form of furnishing a mooring facility, probably waterlogged and anchored on too short a chain, would have been more justifiable than the present findings of sole fault on the part of appellants.

It is respectfully submitted that the Interlocutory Decree and Order of Reference entered below should be reversed, with directions to dismiss the libel.

HILL, MORGAN & FARRER,
By WILLIAM S. SCULLY,
Proctors for Appellants.